



SO ORDERED.

SIGNED this 15 day of November, 2004.


JANICE MILLER KARLIN
UNITED STATES BANKRUPTCY JUDGE

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF KANSAS**

In re:)
)
HOWARD GALEN FRAZIER and)
SHIRLEY MAY FRAZIER,) **Case No. 03-43151-7**
)
Debtors.)
_____)

**MEMORANDUM AND ORDER DENYING
MOTION TO FILE EXEMPTION CLAIM OUT OF TIME**

This matter is before the Court on the Motion to File Exemption Claim Out of Time by Dependant.¹
Debtor, Shirley Frazier, filed this motion seeking leave to claim proceeds from the settlement of her husband's asbestos litigation, as exempt pursuant to 11 U.S.C. § 522(d)(10)(C).² This matter constitutes

¹Doc. 13.

²All future statutory references are to the Bankruptcy Code, 11 U.S.C. § 101, et seq., unless otherwise specified.

a core proceeding,³ and this Court has jurisdiction to decide this matter.⁴ The Trustee has objected to the motion to file the exemption claim out of time, and the Court sustains that objection on the basis of futility.

I. FINDINGS OF FACT

Debtors filed their petition for relief under Chapter 7 of the Bankruptcy Code, along with all schedules and statements, on October 30, 2003. Debtors failed to schedule as an asset on Schedule B,⁵ or to exempt, under Schedule C, Howard Frazier's pending claim against his former employer for injuries he sustained by working with and around asbestos. On April 26, 2004, Mr. Frazier received a check in the amount of \$3,333.33 as a result of that claim. Ms. Frazier now seeks leave to amend their schedules to claim the proceeds from this asbestos claim as exempt pursuant to § 522(d)(10)(C). The Trustee has objected to this motion on the basis that the property does not qualify for exemption sought by the Debtor and that, impliedly, the Court should deny the motion on the basis that to allow the motion would be futile.

II. CONCLUSIONS OF LAW

Section 522(d)(11) provides, *inter alia*, an exemption for the debtor's right to receive "a payment . . . on account of personal bodily injury" or "a payment in the compensation of loss of future earnings of the debtor." The asbestos litigation involved a personal injury claim by Mr. Frazier as a result of his asbestos exposure and was either a payment for that personal bodily injury or, possibly, for a loss of future

³28 U.S.C. § 157(b)(2)(B).

⁴28 U.S.C. § 1334.

⁵Question 20 asks the debtor to list all "contingent and unliquidated claims of any nature..." and Question 31 is the "catch-all" question, requiring debtor to disclose "Other personal property of any kind not otherwise listed."

earnings as a result of that exposure. The payment to Mr. Frazier thus clearly falls within the exemptions contained within § 522(d)(11).

Unfortunately for Debtors, however, Kansas has opted out of the federal exemptions contained in the Bankruptcy Code, and debtors are thus generally prohibited from claiming exemptions arising under the Code.⁶ In addition, Kansas law does not provide a similar exemption for personal injury payments. Kansas law does provide an exception to the general rule that debtors may not elect the federal exemptions contained in § 522, however, and does allow debtors to claim exemptions under § 522(d)(10).⁷ Section 522(d)(10) allows a debtor to claim as exempt, *inter alia*, the debtor's right to receive "a disability, illness, or unemployment benefit."⁸

Debtors, realizing the only federal exemption available to them is contained in § 522(d)(10), thus try to wedge the asbestos settlement into the language of that subsection. Because the very next subsection, (d)(11), so clearly encompasses the asbestos settlement, however, this attempt is unavailing. Even if one could argue that the literal statutory language was unclear, the legislative history of § 522(d)(10) leaves little doubt its purpose is to exempt "certain *benefits* that are akin to future earnings of the debtor."⁹ The legislative history further defines what benefits are included, such as "social security, unemployment compensation, or public assistance benefits, veteran's benefits, disability, illness, or unemployment benefits"

⁶See K.S.A. 60-2312(a).

⁷K.S.A. 60-2312(b).

⁸11 U.S.C. § 522(d)(10)(C).

⁹H.R. 595, 95th Cong. 1st Sess. 362 (1977), U.S. Code Cong. & Admin. News 1978, pp. 5787, 6318 (emphasis added).

A settlement payment for personal injury relating to asbestos exposure does not fall within the types of “benefits” that Congress sought to exempt under § 522(d)(10). The asbestos settlement is a payment “on account of personal bodily injury” suffered by Mr. Frazier, which clearly falls under § 522(d)(11). A portion of the settlement may constitute payment for the disability he received as a result of the asbestos exposure, but it is not a disability “benefit” as envisioned by § 522(d)(10).

III. CONCLUSION

The Court finds that the settlement check Mr. Frazier received as a result of the asbestos litigation is not exempt pursuant to 11 U.S.C. § 522(d)(10)(C), but instead falls within § 522(d)(11), which is not available to Kansas debtors. Therefore, the Motion to File Exemption Claim Out of Time by Dependant is denied, as allowing Debtors to amend their schedules to claim this property as exempt would be futile.

IT IS, THEREFORE, BY THIS COURT ORDERED that the Motion to File Exemption Claim Out of Time by Dependant is denied.

IT IS SO ORDERED.

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